MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR.,

Petitioner,

—v.—

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Respondents.

BRIEF FOR RESPONDENT REA EXPRESS, INC.

ARTHUR M. WISEHART
219 East 42nd Street
New York, New York 10017
Attorney for Respondent
REA Express, Inc.

FRANK M. BUSCAGLIA
PETER G. WOLFE
Of Counsel

TABLE OF CONTENTS

PAGE

Preliminary Statement 1

Statement of the Case 1

ARGUMENT

I. No Statutory Basis Exists for Holding That the Statute of Limitations Applicable to an Action Under the Civil Rights Act of 1866 is Tolled by the Commencement of Proceedings Under the Civil Rights Act of 1964 When the Limitations Periods Therein Would Bar All Further Litigation Under That Act 3

II. The Tennessee Statute of Limitations Bars This Action 5

III. Petitioner's Policy Arguments for Extending a Federal Cause of Action Beyond That Specifically Granted in the Civil Rights Act of 1964 Do Not Provide a Jurisdictional Basis for Action by This Court 8

CONCLUSION 12

TABLE OF AUTHORITIES

Cases:

Alexander v. Gardner-Denver Co., —— U.S. ——, 39 L.Ed.2d 147 (1974) 10

American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974) 11

PAGE

Andrews v. Louisville & Nashville R. Co., 406 U.S. 320 (1972) 9
Auto Workers v. Hoosier Corp., 383 U.S. 696 (1966) .. 11

Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952) 9
Burnett v. New York Central R. Co., 380 U.S. 424 (1965) 11
Butterman v. Steiner, 343 F.2d 519 (7th Cir. 1965) 6

Duncan v. Nelson, 466 F.2d 939 (7th Cir. 1972), *cert. denied,* No. 72-5128, 41 U.S.L.W. 3188 (U. S. October 10, 1972) 6

Graham v. Brotherhood of Locomotive Firemen & Enginemen, 338 U.S. 232 (1949) 9
Griffin v. Pacific Maritime Ass'n, 478 F.2d 1118 (9th Cir. 1973), *cert. denied,* 414 U.S. 859 (1974) 4

Harrison v. Wright, 457 F.2d 793 (6th Cir. 1972) 6
Henderson v. Eastern Freight Ways, Inc., 460 F.2d 258 (4th Cir. 1972), *cert. denied,* 410 U.S. 912 (1973) 9

Jenkins v. General Motors Corp., 354 F. Supp. 1040 (D. Del. 1973) 8
Johnson v. Ry. Express Agency, Inc., *cert. granted,* No. 73-1543, 42 U.S.L.W. 3666 (U. S. June 3, 1974) .. 1
Jones v. Bombeck, 375 F.2d 737 (3d Cir. 1967) 5

Kitchen-Miller Co. v. Kern, 170 Tenn. 10, 91 S.W.2d 291 (1936) 7

PAGE

Lovejoy v. Ahearn, 223 Tenn. 562, 448 S.W.2d 420 (1969) 7

Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973) 9

Mann v. Smith, 158 Tenn. 463, 14 S.W.2d 722 (1929) 7

Momand v. Universal Film Exchange, 43 F. Supp. 996 (D. Mass. 1942), *aff'd* 172 F.2d 37 (1st Cir. 1948), *cert. denied,* 336 U.S. 967 6

O'Sullivan v. Felix, 233 U.S. 318 (1914) 4

Parmer v. National Cash Register Co., 346 F. Supp. 1043 (S.D. Ohio 1972) 9

Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) 9

Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653 (1953) 9

Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944) 9

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 10

Williams v. Hollins, 428 F.2d 1221 (6th Cir. 1970) 7

Young v. International Telephone & Telegraph Co., 438 F.2d 757 (3d Cir. 1971) 8

Statutes:

Civil Rights Act of 1866, 42 U.S.C. §1981 .....*passim*

PAGE

Civil Rights Act of 1866, 42 U.S.C. §1988 ..... 3, 5-6

Title VII, Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* ..... *passim*

Federal Employer's Liability Act, 45 U.S.C. §§51 *et seq.* 11

Labor Management Relations Act, Section 301, 29 U.S.C. §185 10

Railway Labor Act, 45 U.S.C. §§151 *et seq.* 9

Tennessee Code Ann. §§28-101–28-115 7

Tennessee Code Ann. §28-301 7

Tennessee Code Ann. §28-304 6

Miscellaneous:

29 C.F.R. §1601.25b(d) 9

S. Rep. 415, 92d Cong., 1st Sess. (1971) 5

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BRIEF FOR RESPONDENT REA EXPRESS, INC.

Preliminary Statement

The opinions of the Court below are set forth in Petitioner's Appendix. References to such Appendix are cited with the suffix "a."

Statement of the Case

The question for which certiorari was granted is as follows (*Johnson* v. *Ry. Express Agency, Inc., cert. granted,* No. 73-1543, 42 U.S.L.W. 3666 (U.S. June 3, 1974)):

> "Whether the timely filing of a charge of employment discrimination with the Equal Employment Opportunity Commission pursuant to Section 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5,

tolls the running of the period of limitation applicable to an action based on the same facts brought under the Civil Rights Act of 1866, 42 U.S.C. §1981?"

As it stands, it is the law of this case that *all* of the applicable time limitation periods specified in Title VII of the Civil Rights Act of 1964 have expired, barring any further judicial proceedings. Thus, in reality, the question presented is whether, notwithstanding its great specificity in fixing limitation periods in Title VII of the Civil Rights Act of 1964, Congress intended that administrative procedures under that Act would have the effect of tolling limitation periods applicable under another civil rights statute, enacted almost 100 years earlier, despite the Congressional purpose of barring any further litigation under the Civil Rights Act of 1964. It is submitted, as shown in more detail in the argument which follows, that the contention advanced by petitioner is not consonant with the Congressional purpose but is, on the contrary, diametrically opposed to it. In such circumstances, any contention concerning supposed deficiencies in the statutory scheme must be addressed to Congress, not to the courts.

ARGUMENT

I.

No Statutory Basis Exists for Holding That the Statute of Limitations Applicable to an Action Under the Civil Rights Act of 1866 Is Tolled by the Commencement of Proceedings Under the Civil Rights Act of 1964 When the Limitations Periods Therein Would Bar All Further Litigation Under That Act.

Although this Court apparently has never directly ruled on the issue, a number of lower courts have held that the Civil Rights Act of 1866, 42 U.S.C. §1981, gives rise to an independent cause of action, separate and apart from the cause of action which arises under the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* The cases so holding are cited in footnote 8 of petitioner's brief herein.

Section 1981 of the Civil Rights Act of 1866 provides (42 U.S.C. §1981):

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

The statute of limitations applicable to any cause of action accruing under Section 1981 is governed by 42 U.S.C. §1988. Section 1988 is mandatory in its language and in pertinent part provides:

"The *jurisdiction* in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced *in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect;* but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, *the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts* in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty." (Emphasis added.)

Cf. *O'Sullivan* v. *Felix,* 233 U.S. 318 (1914); *Griffin* v. *Pacific Maritime Ass'n,* 478 F.2d 1118 (9th Cir. 1973), *cert. denied,* 414 U.S. 859 (1974).

The decisions of the lower courts below establish that the time limitations for further litigation under Title VII of the Civil Rights Act of 1964 have fully expired for the purpose of this case (111a), and certiorari was not granted to review that question. Thus, the question is whether the administrative procedures of Title VII should be given a tolling effect on the time for commencing litigation under the 1866 Act, in effect retroactively amending a statute enacted almost 100 years previously, so that the time for

suing under the earlier Act is *even longer* than that which Congress provided in the 1964 Act for actions arising thereunder. We submit that this contention is directly contrary to the provisions of Section 1988, which are mandatory in nature, and specifically require that the jurisdiction exercised thereunder shall be "in conformity with the laws of the United States."

Further, this contention is inconsistent with the Report of the Senate Committee responsible for the 1972 amendments to Title VII which explained that "neither the . . . provisions regarding the individual's right to sue under Title VII, nor any of the provisions of this bill, are meant to affect existing rights granted under other laws." S. Rep. 415, at 24, 92d Cong. 1st Sess. (1971).

The foregoing shows that there is no basis in federal law for extending the time of suit in actions under the Civil Rights Act of 1866 beyond that in which such actions might be brought prior to the enactment of the Civil Rights Act of 1964; the following section shows that there is no such basis under the law of Tennessee, the state in which the litigation arose.

II.

The Tennessee Statute of Limitations Bars This Action.

Section 1988 also provides that, to the extent federal law is lacking, state "common law" as modified by the constitution and statutes, "shall govern" (42 U.S.C. §1988).

The applicable state law is not limited to state *statutory* law. State *decisional* law also applies including state decisions on tolling. *Jones* v. *Bombeck*, 375 F.2d 737 (3d Cir.

1967); *Harrison* v. *Wright,* 457 F.2d 793 (6th Cir. 1972); *Duncan* v. *Nelson,* 466 F.2d 939 (7th Cir. 1972), *cert. denied,* No. 72-5128, 41 U.S.L.W. 3188 (U.S. October 10, 1972). Section 1988 specifically refers to state "common law" as modified by the constitution and statutes of the state in question. Federal courts therefore have applied state rules tolling statutes of limitations based on the filing of similar actions. *Momand* v. *Universal Film Exchange,* 43 F. Supp. 996, 1008-1010 (Wyzanski, J., D. Mass. 1942), *aff'd.* 172 F.2d 37 (1st Cir. 1948), *cert. denied,* 336 U.S. 967; *Butterman* v. *Steiner,* 343 F.2d 519 (7th Cir. 1965).

The applicable one-year Tennessee statute of limitations reads as follows (T.C.A. §28-304):

> "Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, actions and suits against attorneys for malpractice whether said actions are grounded or based in contract or tort, civil actions for compensatory or punitive damages, or both, *brought under the federal civil rights statutes,* and actions for statutory penalties shall be commenced within one (1) year after cause of action accrued. For the purpose of this section, insofar as products liability cases are concerned, the cause of action for injury to the person shall accrue on the date of the personal injury not the date of the negligence or the sale of a product and in said products cases no person shall be deprived of his right to maintain his cause of action until one (1) year from the date of his injury and under no circumstances shall his cause of action be barred before he sustains an injury." (Emphasis added.)

The Tennessee Code contains specific tolling provisions, none of which would permit tolling in this case.[1] Further, the Tennessee Code specifically forbids tolling unless expressly provided for therein. Section 28-301 of the T.C.A. provides:

> "All civil actions, other than those for causes embraced in chapter 2 of this title [Real actions] should be commenced after the cause of action has accrued, within the periods prescribed in this chapter, *unless otherwise expressly provided.*" (Emphasis added.)

In view of the specificity of these provisions, the Tennessee courts have held that the existence of related proceedings—which would be comparable to the EEOC proceedings in this case—does not constitute a basis for the tolling of the statute of limitations. *Lovejoy* v. *Ahearn,* 223 Tenn. 562, 448 S.W.2d 420 (1969); *Kitchen-Miller Co.* v. *Kern,* 170 Tenn. 10, 91 S.W.2d 291 (1936); *Mann* v. *Smith,* 158 Tenn. 463, 14 S.W.2d 722 (1929). Cf. *Williams* v. *Hollins,* 428 F.2d 1221 (6th Cir. 1970).

Thus, under Tennessee statutory and common law, there is no basis for tolling the statute of limitations applicable to a Section 1981 claim on the basis of pending EEOC proceedings.

[1] T.C.A. §§28-101–28-115.

III.

Petitioner's Policy Arguments for Extending a Federal Cause of Action Beyond That Specifically Granted in the Civil Rights Act of 1964 Do Not Provide a Jurisdictional Basis for Action by This Court.

The two statutes involved in this appeal were enacted nearly a century apart. Hence it cannot be contended that Congress had any plan of extending the remedies available under the Civil Rights Act of 1866 when it enacted Title VII of the Civil Rights Act of 1964, particularly when such extension would take the time periods available under the earlier Act far beyond those specifically provided in the comprehensive statutory plan set forth in the 1964 Act. Petitioner's attempts to create a federal policy argument therefore must fail, for such policy may be grounded only upon Congressional action. If, as petitioner contends, "Title VII contains too many procedural potholes" (Br. 9), that contention must be addressed to the Congress, not to the Courts.[2]

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[2] Further, conciliation activities by the EEOC do not inherently require tolling. As the Court in *Young* v. *International Telephone & Telegraph Co.*, 438 F.2d 757 (3d Cir. 1971), pointed out:

> "Most §1981 cases, and in particular most class actions under §1981, will seek equitable relief. Obviously the availability of conciliation by the EEOC is a factor to be considered in the exercise of discretion in granting such relief.
>
> . . . There is ample scope, within the traditional bounds of discretion in the application of equitable remedies, for the district courts to develop on a case by case basis an accommodation between their jurisdiction under §1981 and the conciliation efforts of the Commission." (438 F.2d at 764.)

Both the Court below in the instant case and the Court in *Jenkins* v. *General Motors Corp.*, 354 F. Supp. 1040 (D. Del. 1973), relied on this concept in holding that the statute of limitations would

Each statute gives rise to different rights and contains different remedies—in short, each sets forth a wholly separate and independent statutory framework. *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979 at 996 (D.C. Cir. 1973). Further, those two statutes are not the only bases of civil rights claims. The Railway Labor Act, 45 U.S.C. §§151 *et seq.*, which is applicable here, has long been held to give rise to an independent cause of action for racially discriminatory employment practices;[3] petitioner was required to utilize the compulsory arbitration provisions under the Railway Labor Act to protest his dismissal and other grievances involving his employment but did not do so,[4] and [illegible] almost all of the states have

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not be tolled. Thus, the conciliation efforts of the EEOC can take place and yet employers will be able to rely on the appropriate state statutes of limitations to protect them against long-delayed and different Section 1981 claims.

Petitioner's comment that the EEOC did not issue a right-to-sue letter in a timely fashion (Br. 9), should be of no concern. The EEOC permits complainants to demand a right-to-sue letter within sixty days after a charge is filed. *Parmer* v. *National Cash Register Co.*, 346 F. Supp. 1043 (S.D. Ohio 1972); cf. *Henderson* v. *Eastern Freight Ways, Inc.*, 460 F.2d 258 (4th Cir. 1972), *cert. denied*, 410 U.S. 912 (1973); 29 C.F.R. §1601.25b(d). Had petitioner thus secured a right-to-sue letter, he could have brought both a Section 1981 action and a Title VII action simultaneously and before the statutes of limitations applicable to such actions had run.

[3] *Steele* v. *Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210 (1944); *Graham* v. *Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232 (1949); *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1952).

[4] *Andrews* v. *Louisville & Nashville R. Co.*, 406 U.S. 320 (1972); *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U.S. 653 (1953). It should be noted that if petitioner's dismissal from employment was without "just cause" he would have been entitled to reinstatement with back pay by an Adjustment Board, a form of compulsory labor arbitration, entirely apart from any burden of proving whether or not racial discrimination existed. Having

laws and procedures designed to eliminate discrimination in employment. Thus, if each of these disparate sources

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been employed for several years, petitioner could not have been unaware of this possibility, yet chose not to avail himself of it. It would seem that a system of compulsory arbitration provided by Congress for the purpose of adjusting such disputes arising under the Railway Labor Act should, at a minimum, *first* be resorted to for whatever remedies it may provide, at no additional cost to those in petitioner's situation, so that the equally strong purpose of Congress in avoiding unnecessary litigation in such employment disputes can be given effect. The District Court below so held (102a), although the Circuit Court's decision was based on separate grounds, and certiorari was not granted on the Railway Labor Act question.

That result would seem especially appropriate in situations like the present case. Petitioner, *who seeks a continuation of the employment relationship* (13a), was discharged based upon a claim of insubordination for allegedly refusing to follow instructions to correct errors made in handling a customer's shipments (27a-29a), and there was a question of whether the employer's progressive discipline system, or the "common law of the shop," had been correctly applied (37a-39a), the very kind of dispute for which labor arbitration is given a preferred status under the law. Cf. *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 at 581-582 (1960). Nothing in *Alexander* v. *Gardner-Denver Co.*, —— U.S. ——, 39 L. Ed.2d 147 (1974), cited by petitioner, is contrary to this point. Indeed that decision is consistent with the point for the following reasons:

1. In *Alexander,* labor arbitration previously *had* taken place pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. §185.

2. The Court spoke approvingly of the fact that there had been labor arbitration and of its potential for reducing the need for litigation and its therapeutic values (42 U.S.L.W. at 4220 and 4218, fn. 13).

3. As mentioned previously this case arises in the context of the Railway Labor Act which involves a system of *compulsory* arbitration, as distinguished from the voluntary arbitration system permitted under Section 301 of the LMRA, and therefore represents an *a fortiori* situation.

4. In *Alexander,* the Court quoted with approval from a memorandum introduced by Senator Joseph Clark, one of the sponsors of the bill which became Title VII, the following explanation: "nothing in Title VII or anywhere else in this bill affects the rights and obligations under the NLRA or the Railway Labor Act . . . . " (42 U.S.L.W. at 4217, fn. 9.)

of rights and remedies relating to civil rights, is to toll actions under the others, a seemingly endless pyramid of tolling could arise, fostering a multiplicity of overlapping administrative and court proceedings, and entirely undercutting the legislative purpose in creating limitation periods applicable to such actions.

Congress did not intend a uniform period of limitations applicable to Section 1981 as in cases under the Federal Employer's Liability Act, 45 U.S.C. §§51 *et seq.*, such as *Burnett* v. *New York Central R. Co.*, 380 U.S. 424 (1965). In a case similar to the instant case, the Court distinguished *Burnett*:

> "In *Burnett* v. *New York Central R. Co.*, 380 U.S. 424, we held that the bringing of a timely action under the Federal Employers' Liability Act in a state court, even though venue was improper, served to toll the statute of limitations contained in that Act. The primary underpinning of *Burnett*, however, is wholly lacking here. As the Court noted in that case, a tolling principle was necessary to implement the national policy of a uniform time bar clearly expressed by Congress when it enacted the FELA limitations provision. 380 U.S., at 434. Section 301 of the Labor Management Relations Act establishes no such policy of uniformity expressed in a national limitations provision." *Auto Workers* v. *Hoosier Corp.*, 383 U.S. 696, 708 (1966).

Unlike the situation in the two cases relied principally upon by petitioner—*Burnett* and *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538 (1974)—this is not a case in which abortive procedural difficulties caused tolling of the limitation periods applicable to procedures under the

same federal statute. Instead, this case involves a claim that although the statute of limitations under the same statute clearly *bars* further litigation, the procedures applicable under that statute nevertheless have the effect of prolonging the possibility of litigation under another statute enacted almost 100 years earlier. This contention is preposterous on its face, and should be rejected.

CONCLUSION

The judgment of the Court of Appeals affirming the District Court's decision should be affirmed.

August 19, 1974

Respectfully submitted,

ARTHUR M. WISEHART
219 East 42nd Street
New York, New York 10017
Attorney for Respondent
REA Express, Inc.

FRANK M. BUSCAGLIA
PETER G. WOLFE
Of Counsel